



North Carolina Department of Environment and Natural Resources
Division of Air Quality

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Governor

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Director

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Secretary

MEMORANDUM

TO: B. Keith Overcash

FROM: Donald R. van der Vaart, Lee Daniel

DATE: April 3, 2009

SUBJECT: 112(j) Procedures

On February 24, 2009, the North Carolina Department of Justice (“DOJ”) issued an advisory memorandum (“DOJ Memorandum”) discussing the effect of vacatur on applicability of § 112(j) of the Clean Air Act (“CAA”). According to the memorandum, “promulgation followed by vacatur amounts to a ‘failure to promulgate’” As a result of this reasoning, the DOJ Memorandum concluded that the CAA § 112(j) requirements apply to source categories affected by vacatur and recommended that the North Carolina Division of Air Quality (DAQ) take prompt remedial measures to address § 112(j) requirements. The purpose of this memorandum is to establish procedures the DAQ will use to implement the DOJ Memorandum.

Background

Section 112 of the CAA enacts the regulation of hazardous air pollutants (“HAP”). Under § 112(d), U.S. EPA must promulgate federal maximum achievable control technology (“MACT”) standards for identified industrial source categories by the deadlines specified pursuant to § 112(e). However, in the event that U.S. EPA fails to meet a required deadline, § 112(j), commonly referred to as the MACT “hammer” provision, requires the permitting authority (generally the state) to issue permits to sources that would have been subject to the MACT. The permits must include a MACT standard established pursuant to § 112(j) that the permitting authority determines on a case-by-case basis to be “equivalent to the limitations that would apply if an emission standard had been issued in a timely manner” 40 CFR 63.55(a).

North Carolina’s § 112(j) regulations are found in 15A NCAC 2D .1109. (See also the Code of Federal Regulations (CFR) implementing § 112(j) at 40 CFR 63.50-.56) In accordance with these regulations, an affected source must submit a Part 1 application notifying the permitting authority that it belongs to a source category for which U.S. EPA failed to promulgate a timely MACT standard. The Part 1 application must be submitted no later than 18 months after the date that U.S. EPA failed to promulgate the relevant standard. 40 CFR 63.52(a)(1).

The source must then submit a Part 2 application within 60 days of the Part 1 submittal deadline. The content of the Part 2 application must meet the requirements of 40 CFR 63.53(b), including identification of each emission point at the facility that is part of the affected industrial category or subcategory, associated control technologies, existing HAP limits, and any additional information requested by the permitting authority. The Part 2 application submittals were required by deadlines specified by the U.S. EPA in Table 1 of 40 CFR 63, Subpart B.¹ (e.g., Industrial Boilers and Institutional/Commercial Boilers and Process Heaters not burning hazardous waste were required to submit Part 2 applications by April 28, 2004).

Within 60 days of the Part 2 submittal, the permitting authority must notify the source if the application is administratively incomplete. The permitting authority must issue a Title V permit meeting the § 112(j) requirements within 18 months of receiving an administratively complete Part 2 application. The permitting authority may continue to request additional technical information from the source throughout the review process. The source is required to be in compliance with the HAP emissions limitations no later than 3 years after the permitting authority issues the Title V permit with the case-by-case MACT standard.

As detailed in the DOJ Memorandum, when U.S. EPA promulgates a MACT standard that is subsequently vacated by the courts, the vacatur is retroactive and returns all parties to *status quo ante*. Therefore, if the vacatur occurs after the promulgation deadline, the MACT “hammer” provisions retroactively apply. In 2007, three such vacaturs occurred. For each of the vacated MACT standards listed below, the mandate was issued after the required U.S. EPA promulgation date. Therefore the DAQ must implement the § 112(j) requirements retroactively. The remainder of this memorandum establishes procedures for implementing the § 112(j) requirements for each of the vacated MACT standards.

Source Category	Court Action / Date of Mandate	Part 2 Application Deadlines
Plywood & Composite Wood Products (40 CFR 63, Subpart DDDD)	Partial Vacatur / October 4, 2007 <i>NRDC v. EPA</i> , No. 04-1323 (D.C. Cir. June 19, 2007)	April 28, 2004
Brick & Structural Clay Products Manufacturing (40 CFR 63, Subpart JJJJ)	Full Vacatur / March 13, 2007 <i>Sierra Club v. EPA</i> , 479 F.3d 875 (D.C. Cir. 2007)	May 15, 2004 ^(Fn 1)
Indus., Commercial, & Instit. Boilers & Process Heaters (40 CFR 63, Subpart DDDDD)	Full Vacatur / July 20, 2007 <i>NRDC v. EPA</i> , 489 F.3d 1250 (D.C. Cir. 2007)	April 28, 2004

Fn 1: Pursuant to 112(e), U.S. EPA was required to promulgate this § 112(d) standard by November 15, 2000. As originally conceived, Part 1 application submittals were required 18 months following the missed promulgation date. Part 2 application submittals were required within 24 months of the Part 1 submittal. 67 FR 16582. The Part 2 application deadline for the Brick MACT would have been 42 months following the required U.S. EPA promulgation date. On May 30, 2003, the MACT “hammer” provision was revised to require the Part 2 submittal within 60 days of the Part 1 submittal. 69 FR 32586.

¹ On May 30, 2003 the U.S. EPA issued a final rule amendment to the § 112(j) regulations (68 Fed. Reg. 32586). In this rulemaking the U.S. EPA established a timetable for the submission of Part 2 applications for source categories for which the U.S. EPA had not yet promulgated final § 112(d) MACT Standards.

Plywood and Composite Wood Products MACT (40 CFR 63, Subpart DDDD)

Because U.S. EPA was late in promulgating this § 112(d) standard, affected sources were required to submit Part 1 applications to the DAQ by no later than May 15, 2002. Part 2 applications were due April 28, 2004. While U.S. EPA failed to promulgate the standard by the Part 2 deadline, they did propose a § 112(d) standard on January 9, 2003. As a result, very few sources submitted a Part 2 application. The DAQ chose not to enforce against facilities that did not submit the Part 2 application on time, and on July 30, 2004 the U.S. EPA issued a final MACT rule. On July 4, 2007, the D.C. Cir. Court vacated portions of the Plywood and Composite Wood Products MACT (“Wood Products MACT”), including the low risk compliance option. *See NRDC v. EPA*, No. 04-1323 (D.C. Cir. June 19, 2007).

However, because the subsequent rule vacatur returns all parties to *status quo ante*, sources affected by the Wood Products MACT vacatur may elect to submit Part 2 applications consistent with the § 112 subcategorization provisions and *NRDC* decision. For sources that are currently subject to the § 112(d) standard and do not wish to pursue subcategorization no further action is required.

Brick and Structural Clay Products Manufacturing MACT (40 CFR 63, Subpart JJJJJ)

Because U.S. EPA was late in promulgating the Brick and Structural Clay Products Manufacturing MACT (“Brick MACT”), affected sources were required to submit Part 1 applications to the DAQ by no later than May 15, 2002 pursuant to 40 CFR 63.52(a)(1). On May 16, 2003, before the Part 2 applications were required, U.S. EPA issued the Brick MACT. On May 13, 2007, the D.C. Cir. Court vacated the § 112(d) standard. *See Sierra Club v. EPA*, 479 F.3d 875 (D.C. Cir. 2007)

Before the court subsequently vacated the MACT standard, the affected sources in North Carolina submitted applications necessary to comply with the standard (“§ 112(d) applications”).² While these sources are now subject to the Part 2 submittal deadline of May 15, 2004, the § 112(d) applications are presumed to include sufficient information about the source and associated HAP emissions to satisfy the Part 2 application requirements. The DAQ will use the information in those applications to determine case-by-case HAP emission limits for the sources in accordance with CAA § 112(j).

However, because the subsequent rule vacatur returns all parties to *status quo ante*, sources affected by the Brick MACT vacatur may elect to amend their applications to be consistent with the § 112 subcategorization provisions and the *NRDC* decision. *See NRDC v. EPA*, No. 04-1323 (D.C. Cir. June 19, 2007). Affected sources may also elect to amend their applications to be consistent with the health-based compliance alternative (HBCA) that was available both in the Brick MACT proposal and in the previously promulgated MACT standard for boilers (see below). *See Sierra Club*, 479 F.3d 875 and *NRDC v. EPA*, 489 F.3d 1250 (D.C. Cir. 2007).

The Brick MACT was vacated after the initial compliance date of the standard. Therefore, affected sources were required to comply with North Carolina’s state-enforceable toxic air pollutant (TAP) rules pursuant to 15A NCAC 2Q .0705. The subsequent rule vacatur returns all parties to *status quo ante*, presumably “un-triggering” the state-enforceable TAP rules. However, in the interest of maintaining the existing level of environmental protection, the DAQ will continue to apply these rules to brick manufacturers under a Director’s SIC Call, as provided in 15A NCAC 2Q .0705(c).

² The mandate for the Brick MACT vacatur was issued on March 13, 2007. This was after May 16, 2006, the initial compliance date for existing sources that did not receive a compliance extension. Therefore, many sources were required to comply with the vacated rule between May 16, 2006 and March 13, 2007.

Industrial, Commercial, and Institutional Boilers and Process Heaters MACT (40 CFR 63, Subpart DDDDD)

Because U.S. EPA failed to promulgate the Industrial, Commercial, and Institutional Boilers and Process Heaters MACT (“Boiler MACT”), affected sources were required to submit Part 1 applications to the DAQ by no later than May 15, 2002 pursuant to 40 CFR 63.52(a)(1). Part 2 applications were due April 28, 2004. While U.S. EPA failed to promulgate the standard by the Part 2 deadline, they did propose a § 112(d) standard on January 13, 2003. As a result, very few sources submitted a Part 2 application. The DAQ chose not to enforce against facilities that did not submit the Part 2 application on time, and on September 13, 2004 the U.S. EPA issued a final MACT rule. On July 20, 2007, the D.C. Cir. Court vacated the Boiler MACT. *NRDC*, 489 F.3d 1250.

Any affected facility that has not yet submitted a Part 1 application must submit such application to the DAQ by no later than August 1, 2009 (postmarked). All Part 2 applications must be submitted to the DAQ by no later than September 30, 2009. Because the subsequent rule vacatur returns all parties to *status quo ante*, in addition to proposing control technologies, applications may propose subcategorization provisions consistent with § 112 as well as the HBCA that was available in the previously promulgated § 112(d) standard. *See NRDC v. EPA*, No. 04-1323 (D.C. Cir. June 19, 2007) and *NRDC*, 489 F.3d 1250.

Prior to the required Part 2 application submittal deadline, the DAQ will provide facilities affected by the Boiler MACT with a model § 112(j) standard, including HAP emissions limitations the DAQ determines to be equivalent to a MACT limitation had U.S. EPA promulgated a valid standard in a timely manner. Facilities may choose to base the Part 2 application on either the DAQ’s model rule or prepare and submit a facility-specific “case-by-case” MACT that is consistent with the § 112(j) requirements.